IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

FRIDAY, THE 15TH DECEMBER 2006 / 24TH AGRAHAYANA 1928

Crl.Rev.Pet.No. 894 of 1998(C)

CRA.47/1996 of SESSIONS COURT, MANJERI
CC.153/1994 of JUDL. MAGISTRATE OF FIRST CLASS COURT, PARAPPANANGADI

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REVN. PETITIONER(S):

SHAJAHAN @ KUNHUTTY @ SHAJI, S/O.KOYAKUTTY,
C.NO.2983, CENTRAL PRISON, KANNUR.

BY ADV. ADV.C.T JESTIN(STATE BRIEF)

RESPONDENT(S):

STATE OF KERALA, REP. BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

PUBLIC PROSECUTOR SRI.C.M.KAMMAPPU.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 15/12/2006 THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.HEMA, J.

CRL.R.P.NO.894 of 1998

Dated this the 15th day of December, 2006

O R D E R

This revision petition arises from the conviction and sentence passed against the appellant for offences under Sections 457, 380 and 461 of the Indian Penal Code. The revision petitioner was sentenced to undergo rigorous imprisonment for two years under section 457 IPC, rigorous imprisonment for three years under Section 380 IPC and rigorous imprisonment for one year under Section 461 IPC which will run concurrently and to pay a fine of Rs.1,000/- each under Sections 457 and 380 IPC and in default, to undergo simple imprisonment for six months each.

2. According to prosecution, on 26.8.1993 in between 11 pm and 5 am the accused broke open the house of PW1 and by removing an iron rod of the ventilator of the toilet he entered into the house and committed theft of gold ornaments of various quantity by breaking open a suitcase. The accused was arrested on 14.12.1993 in connection with another crime No.156/93 by PW7, Circle Inspector of Police. On a confession statement made by him, the MO1 gold ingot was seized from the shop of PW3 as produced by him. The recovery was made pursuant to a statement given by the accused to the Police Officer, PW7 under Exhibit P3 mahazar. Pws 4 and 5 are the attestors of the mahazar. Exhibit P6 is the confession

statement.

3. It is also the case of the prosecution that the accused led PW7 to the house of PW1 pursuant to the confession statement made by him and thereafter on instruction by the Police PW1 gave the first information statement on 20.12.1993 at 5.30 pm in the Kalpakanchery Police Station. The said first information statement is Exhibit P1, based on which Exhibit P7 FIR was registered against the accused. PW8 completed the investigation and laid charge before the trial court.

4. The evidence in this case consists of oral testimony of PW1 to PW7, Exhibits P1 to P7 and PW1. Based on this evidence it was found that the prosecution proved that the accused committed various offences beyond reasonable doubt. The trial court convicted and sentenced the accused and an appeal was filed before the Sessions Court. The appeal was dismissed.

5. The appellant was undefended and hence, Sri.C.T.Jestin was appointed as State Brief. Heard both sides. Perused records. The main evidence in this case is that of PW7, the Investigating Officer, PW3 to PW5, witnesses relating to the recovery of MO1 gold ingot and Exhibit P3. It is needless to say that the court can act upon only the legal evidence which is admissible as per law. The gold ingot is MO1 allegedly recovered as per Exhibit P3. But to prove recovery under a mahazar, the original of mahazar is not before the court. There is absolutely no explanation for the prosecution for non production of Exhibit P3. Therefore, Exhibit P3 which

is to be totally excluded from evidence, does not admissible in evidence.

6. The evidence of PW3 to PW5 would go to show that they turned hostile to the prosecution and denied entire case set up by the prosecution. PW3 to PW5 categorically deposed that they do not know the accused. All of them stated before the court that they had not witnessed any recovery as alleged by PW7. Since Ext.P3, the mahazar is not admissible in evidence, there is only oral evidence of PW7 to test the veracity of the evidence of PW5 to PW7. Though PW5 to PW7 were cross-examined at length, nothing is brought out from their evidence to discredit their version. It appears that some portion from the case diary statements were referred to while cross-examining these witnesses. But none of the portions of the statements were marked in evidence nor proved. Therefore, there is nothing in evidence to show that PW3 to PW5 gave evidence contrary to the statements which they had allegedly made to the Police.

7. The hostility to the prosecution can be proved by bringing out materials by cross-examination but prosecution has failed to do so. Thus, evidence of PW3 to PW5 will not reveal that they have come forward with a new case, giving up their earlier version before the police. In such circumstances, the evidence of PW3 to PW5 cannot be treated as hostile evidence. But the fact remains is that their evidence is of no use to the prosecution. Their evidence can only be discarded along with Exhibit P3.

8. What remains is only the evidence of PW7, the Investigating

Officer. The Investigating Officer has given evidence that the accused was arrested on 14.12.1993. The accused has a definite case as revealed from the cross-examination that the details of the arrest are not stated by the prosecution. He has given a version at the time of questioning under Section 313 Cr.PC that he was arrested under a particular circumstance. But prosecution is silent about the time of arrest or the place of arrest. PW7 did not state from which place and at what time accused was arrested. The time of arrest and place of arrest become relevant for various aspects. This will be necessary to appreciate whether the alleged recovery can be accepted or not. It was the duty of the prosecution to prove that the accused was arrested from a particular place and time especially when the accused challenged the arrest from the very right beginning. Therefore, the evidence regarding the arrest and the circumstances under which the accused was arrested is shabby.

9. The main crucial aspect which strikes me is the illegality of the recovery. The alleged arrest is on 14.12.1993. As per the evidence of PW7, the recovery is made after four days of the arrest on 18.12.1993. The evidence of PW7 is that on the arrest of the accused he had made a confession but delay is not explained. Even if the delay is explained, the recovery allegedly made in this case is illegal because on 18.12.1993 as per the evidence adduced in this case, the recovery is made when the accused was in illegal custody. As per Section 167 of Cr.P.C., the Police Officer is bound to produce the accused within 24 hours of the arrest

before the court. There is no evidence to show that he was produced before the Magistrate within 24 hours.

10. There is also nothing to show that Police had any authority to keep the accused in custody after 24 hours of the arrest. The custody of the accused after 24 years of the arrest is illegal. The time of arrest becomes relevant in this context also. Any way, it is clear from the evidence of PW7 that the recovery was made at the instance of the accused after four days of the arrest on 18.12.1993. As per the evidence of PW7, the accused was taken to the shop of PW3 as led by him etc. and as pointed out by him and there is no doubt that the accused was in illegal custody of the police officer at that time.

11. Even otherwise there is total impropriety in basing conviction on the evidence relating to the recovery of MO1 in this case. If as a matter of fact the accused has given a confession statement on 14.12.1993 and the entire information was available to the police, there is no reason why recovery was not effected within a reasonable time. Why four days is taken for the recovery is something to be explained by the police and the prosecution. This has not been done in this case. All these would certainly cast a doubt on the veracity of the prosecution.

12. The mere fact that he was allegedly arrested and the mere fact that an FIR was registered against him are not at all reasons to convict a person without any legal evidence. The prosecution has to prove the case beyond reasonable doubt. But this is a case where the prosecution

miserably failed to produce any evidence to connect the accused with the crime. It is also relevant to note that almost all the investigation was over before the FIR was registered in this case. This is another peculiarity in this case. The arrest of the accused, recovery of MO1, the attestation of mahazar relating to the recovery are all done even prior to the registration of the crime. The recovery is on 18.12.1993, but the FIR was registered only two days thereafter.

13. In the matter of registration of the crime also there is inordinate delay. According to PW7, the accused was taken to the house of PW1. PW1 would say that after five days he went to the police station and laid a complaint. Why the police did not register the crime till then, is another mistake. Taking all these facts into consideration, I find that there is apparently no evidence to connect the accused with any of the offences under Sections 457, 380 and 461 of IPC. The conviction and sentence passed against the appellant are hence unsustainable and liable to be set aside and I do so. The accused is found not guilty and he is acquitted of offences under Sections 457, 380 and 461 of IPC. He is set at liberty forthwith.

This Revision Petition is allowed.

K.HEMA, JUDGE

vgs.